

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

**In re:**

**ON-LINE TRAVEL COMPANY (OTC)  
HOTEL BOOKING ANTITRUST  
LITIGATION**

**Case No. 3:12-MD-2405-B**

(This document is filed on behalf of the Plaintiffs in 3:13-cv-00090-B; 3:13-cv-00048-B; 3:12-cv-05269-B; 3:13-cv-00067-B; 3:12-cv-05206-B; 3:13-cv-00047-B; 3:13-cv-00049-B; 3:13-cv-00050-B; 3:12-cv-05291-B; 3:12-cv-05299-B; 3:13-cv-00055-B; 3:13-cv-00068-B; 3:13-cv-00057-B; 3:13-cv-00052-B; 3:13-cv-00051-B; 3:13-cv-00056-B; 3:13-cv-00053-B; 3:12-cv-05189-B; 3:13-cv-00054-B; 3:13-cv-00089-B)

**ORIGINAL AND CONSENSUS PLAINTIFFS' POSITION STATEMENT**

Twenty-two Plaintiffs in 20 of the 31 cases (the "Consensus Plaintiffs") transferred by the Judicial Panel on Multi-District Litigation to this Court, including Plaintiffs Nikita Turik and Eric Balk who filed the first complaint triggering this MDL (the "Original Plaintiffs"),<sup>1</sup> respectfully submit this brief to set forth their suggestions in response to the January 25, 2013 Order Setting Status Conference.

**I. This Court Should Appoint Hagens Berman Sobol Shapiro LLP as Interim Lead Counsel and Stanley Iola as Liaison Counsel**

The Consensus Plaintiffs respectfully suggest that the Court should address the issue of appointment of lead counsel for the putative class as soon as possible so that the case may move forward in an organized fashion. Now, or at a time set by the Court, the Consensus Plaintiffs will apply for an order appointing Hagens Berman Sobol Shapiro LLP ("Hagens Berman") as Lead Counsel and Stanley Iola LLP ("Stanley Iola") as Liaison Counsel for the putative class.

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<sup>1</sup> See Appendix in Support of Original and Consensus Plaintiffs' Position Statement, APP 5-19, for the full list of Plaintiffs, cases and law firms supporting this Position Statement.

Federal Rule of Civil Procedure 23(g)(3) permits the Court to “designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.”

In selecting lead counsel, the Court should consider the following factors:<sup>2</sup> (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel’s experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel’s knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class. We briefly address the firms’ qualifications so the Court can assess our experience while considering the case management issues addressed below.

#### **A. Hagens Berman**

Based on these factors, the Consensus Plaintiffs request the Court appoint Hagens Berman as Lead Counsel for the following reasons:

**1. *After a thorough investigation, Hagens Berman developed and filed the first case.*** Hagens Berman initiated this litigation, thoroughly investigating, analyzing and cogently presenting the underlying facts and operative legal theories before filing suit. While the United Kingdom’s Office of Fair Trading (“OFT”) issued a Statement of Objections alleging that Booking.com B.V., Expedia Inc. and InterContinental Hotels Group plc violated competition law, the OFT did not publish detailed findings. Rather, Hagens Berman examined the industry, reviewed documents from and interviewed third-party industry insiders, retrieved historical pricing data, and researched industry pricing policies and enforcement. Hagens Berman fully vetted and filed the first complaint with substantial supporting evidence.

**2. *Hagens Berman has the resources and experience to lead this antitrust MDL.***

Hagens Berman has the resources to lead this litigation, a nation-wide presence, is recognized as

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<sup>2</sup> Fed. R. Civ. P. 23(g)(1)(A). The Court may also consider any other matter pertinent to counsel’s ability to fairly represent the putative class. *Id.* at 23(g)(1)(B).

one of the top law firms in the United States, and has extensive antitrust experience, as well as specific experience with on-line travel company pricing and charges. Not only did Hagens Berman serve as co-lead counsel in *In re Visa Check/MasterMoney Antitrust Litig.*, No. 96-cv-05238 (E.D.N.Y.), one of the largest civil antitrust recoveries to date, but also was lead counsel in *Expedia Hotel Taxes and Fees Litigation* (Wash. St. Ct.), obtaining summary judgment to recover deceptive service fees on hotel room bookings with Expedia for the certified nationwide class and ultimately settling the case for \$123.4 million. *See* APP 21-51 (Firm Resume).

Hagens Berman will devote the resources necessary to aggressively prepare a case for trial. To do so, Hagens Berman will rely on several of the firm's most experienced antitrust litigators and trial lawyers, including founder and Managing Partner, Steve W. Berman, as well as partners Elizabeth A. Fegan, Jeff D. Friedman, and George W. Sampson.<sup>3</sup> Of particular note, Mr. Berman has served as lead counsel in antitrust, securities, consumer, products liability, employment class actions, and complex litigations throughout the country, including MDL actions. For example, Mr. Berman was the lead trial lawyer in:

- *In re Pharm. Indus. Average Wholesale Price Litig.*, MDL No. 1456 (D. Mass.), where Mr. Berman tried the class case against four manufacturers and successfully argued the appeal of the verdict before the First Circuit;
- *New England Carpenters v. First DataBank, et al.*, No. 05-11148-PBS (D. Mass.), where Hagens Berman achieved a \$350 million settlement eleven days before trial was scheduled to start on behalf of a nationwide class of private payors that purchased prescription brand name drugs;
- *In re Charles Schwab Corp. Secs. Litig.*, No. 08-cv-1510 (N.D. Cal.), a recent securities class action that settled during the course of argument on *in limine* motions for approximately \$235 million or a 42.5% recovery for the federal class and an 80% recovery for the California class, once again on the eve of trial; and
- *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices & Prods. Liab. Litig.*, No. 8:10ML2151 JVS (FMOx) (C.D. Cal.), in which Judge James V. Selna *sua sponte* identified Mr. Berman as a presumptive co-lead counsel when Judge Selna was assigned the Toyota MDL. A settlement of that case was just recently announced, and is valued in excess of \$1.2 billion.

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<sup>3</sup> Each of their biographies is included. *See* APP 48-51.

APP 22-51. Perhaps most notable is Mr. Berman's role as a special assistant attorney general for the states of Washington, Arizona, Illinois, Indiana, New York, Alaska, Idaho, Ohio, Oregon, Nevada, Montana, Vermont, and Rhode Island in the landmark *Tobacco Litigation*. That case resulted in the largest settlement in history, a settlement that occurred while Mr. Berman was in trial in *State of Washington v. Philip Morris, et al.*

**3. *Hagens Berman developed a leadership consensus that comprises a brain trust of the best antitrust lawyers in the United States.*** Hagens Berman devoted extensive time successfully developing a leadership consensus among Plaintiffs' counsel. The majority of MDL firms recognized Hagens Berman's leadership role in investigating and initiating this matter and agreed Hagens Berman should be appointed Lead Counsel. That consensus includes top-tier antitrust Plaintiffs' firms throughout the United States. *See* APP 5-19. This consensus group has demonstrated their ability to work together,<sup>4</sup> and are prepared to share the risk of litigating and expense with Hagens Berman. The Consensus Plaintiffs know that Hagens Berman will efficiently manage the work so as to reduce duplication of effort while maximizing their co-counsel's collective knowledge and experience.<sup>5</sup>

### **B. Stanley Iola**

The Consensus Plaintiffs also request the Court appoint Stanley Iola as Liaison Counsel. Marc Stanley of Stanley Iola is Board Certified in Civil Trial Law by the Texas Board of Legal Specialization, is a past President of Texas Trial Lawyers Association, and has been named a Texas Super Lawyer since 2003 (the first year the list was published). Mr. Stanley regularly

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<sup>4</sup> *See, e.g.*, APP 52-54 (Letter to Travelocity's counsel dated February 7, 2013).

<sup>5</sup> To that end, Consensus Plaintiffs propose Guidelines To Limit Costs And Expenses, Including Attorneys' Fees ("Guidelines"). *See* APP 55-60. The Guidelines reflect the Consensus Plaintiffs' understanding of the need to monitor attorney billing and expenses in order to minimize duplicative or unnecessary work. Thus, the Guidelines reflect the dual interest of balancing efficiency with the need to maintain quality and thoroughness in prosecuting this case. Similar guidelines were recently approved in *In Re Carrier IQ, Inc., Consumer Privacy Litig.*, No. 12-md-2330-EMC (N.D. Cal.). *See* APP 61-62 (September 10, 2012 Order).

practices before this Court, concentrating his practice on complex commercial litigation. He has served as court-appointed class counsel and liaison counsel in numerous class actions, including antitrust matters. *See* APP 158-160. Mr. Stanley and Stanley Iola will work with Plaintiffs to ensure this Court's procedures are followed and expectations are met, and Plaintiffs work efficiently towards a successful resolution.

## **II. Consolidation Of The MDL Cases Is Appropriate**

Pursuant to Local Rule 42.1, as well as the Transfer Order from the JPML, consolidation of the cases for pre-trial proceedings is appropriate. Lead Counsel will file a single Consolidated Amended Complaint, incorporating the allegations and claims applicable to all cases, thereby providing the Court with a single vehicle relative to which motions and discovery will proceed.<sup>6</sup>

## **III. Whether The Appointment Of A Special Master May Aid In Resolution Of The MDL**

Plaintiffs believe this issue should be addressed at a later date when the parties can see how the case is progressing and assess whether a Special Master would be helpful to resolution.

## **IV. Proposed Case Management Orders or Methods, Including Scheduling**

### **A. Scheduling**

#### **a. Travelocity Arbitration Demand**

On or about February 4, 2013, Travelocity served letters on all Plaintiffs (regardless of whether the Plaintiff purchased through Travelocity), demanding that Plaintiffs withdraw their claims, pursuant to an alleged arbitration clause and waiver of class claims in the Travelocity User Agreement. Plaintiffs suggest the following schedule for the resolution of this issue (which affects Travelocity only):<sup>7/8</sup>

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<sup>6</sup> Moreover, all filings should be made in one consolidated MDL docket so that all Plaintiffs have access to and notice of any filings by any other party.

<sup>7</sup> The Consensus Plaintiffs suggested this procedure to Travelocity via letter dated February 7, 2013, and conferred with Travelocity's counsel via telephone. Travelocity agreed in principle to this proposal.

<sup>8</sup> This same procedure is currently being utilized in *In re Carrier IQ, Inc. Consumer Privacy Litig.*, Case No. C-12-md-2330-EMC (N.D. Cal.). *See* APP 63-70 (Stipulation And Order For Continuance Of Time For Defendants To File Motion(s) To Compel Arbitration And Regarding A Briefing Schedule).

Travelocity to file its motion to compel arbitration	14 days after the appointment of Lead Counsel for the Plaintiffs
Plaintiffs shall serve arbitration related discovery, if any	Within 14 days after the filing of the motion to compel arbitration
Defendant will serve its responses and objections to Plaintiffs' arbitration-related discovery requests	Within 30 days of receiving the requests
Plaintiffs' opposition to Travelocity's motion to compel arbitration	Within 40 days of the completion of arbitration discovery, or denial of any motions to compel arbitration related discovery
Defendant's reply, if any, in support of its motion(s) to compel arbitration	Within 30 days after the filing of Plaintiffs' Opposition.

With respect to the remaining Defendants, Plaintiffs propose the following schedule:

Initial Discovery Period	Defendants to produce Government Investigation Documents (defined below)	Within 30 days of the initial status conference
	The parties are to confer during this period and present to the Court for approval: (i) a Protective Order; (ii) a Protocol for the Production of Electronically-Stored Information; (iii) a proposed Discovery Plan.	Within 30 days of filing of Consolidated Amended Complaint
Initial Pleadings	Plaintiffs to file Consolidated Amended Complaint	Within 60 days of appointment of Lead Counsel
	Defendants to answer or otherwise plead	Within 60 days of filing of Consolidated Amended Complaint
	Plaintiffs to respond to any motions to dismiss	Within 45 days of filing of motion to dismiss
	Defendants to file reply in support of motion to dismiss	Within 30 days of filing of response to motion to dismiss
Discovery prior to class certification	Discovery begins pursuant to a Court-approved Discovery Plan	At such time as agreed to by the parties or on a schedule set by the Court.
	Discovery closes pursuant to Court-approved Discovery Plan	Nine months after discovery commences
Plaintiffs' Motion For Class Certification	Plaintiffs' Motion For Class Certification, together with any expert reports	Within 30 days of the close of discovery
	Defendants to take the depositions of Plaintiffs' experts	Within 45 days of the filing of Plaintiffs' Motion

	Defendants to file their response to the Motion For Class Certification, together with any expert reports	Within 60 days of the filing of Plaintiffs' Motion
	Plaintiffs to take the depositions of Defendants' experts, if any	Within 45 days of the filing of Defendants' Response
	Plaintiffs to file their reply, together with any expert rebuttal reports	Within 60 days of the filing of Defendants' Response
	Defendants to take the depositions of any rebuttal experts	Within 14 days of the filing of Plaintiffs' Reply
Remaining Schedule	The parties to confer on and present a schedule to the Court with respect to any remaining discovery to be conducted in light of the Court's decision on class certification, as well as the schedule for dispositive motions, and Rule 26(a)(2) expert discovery	Within 14 days of the Court's ruling on Plaintiffs' Motion For Class Certification

## **B. Discovery Management Proposals**

### **a. Early Production of Documents Produced to the OFT ("Government Investigation Production")**

Documents previously produced to governmental entities are appropriate for early production in civil litigation due to the limited burden entailed in such a production. Here, at least three Defendants (Booking.com, Expedia and Intercontinental) have a Government Investigation Production that has been culled for relevancy and privilege in responding to the OFT's investigation and Statement of Objections. Other Defendants may have done the same in response to investigations by competition authorities. Thus, the early production of the Government Investigation Productions is a way to expedite discovery in complex litigation and to reduce burden. For this reason, several MDL courts have entered early case management orders requiring the production of Government Investigation Productions before the filing of the Consolidated Amended Complaint. For example, in *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, and Prods. Liab. Litig.*, No. 8:10ML2151 JVS (FMOx)

(C.D. Cal.), Judge Selna ordered that the Government Investigation Productions be produced 30 days before the due date for the Consolidated Amended Complaint, stating:

... the Court is convinced that defendants have within their possession a defined set of documents, consisting of approximately 75,000 to 100,000 pages, much or all of which is likely to be discoverable, and which has already been produced to Government entities to date, including without limitation to the United States Congress and National Highway Traffic Safety Administration. Those documents which are discoverable under Federal Rules of Civil Procedure shall be produced no later than July 2, 2010.

APP 141.<sup>9</sup> That same procedure would be equally applicable here.

### **b. Discovery Plan**

There are a multitude of methods for managing discovery prior to Plaintiffs' Motion For Class Certification that permit Plaintiffs access to relevant information, while balancing Defendants' desire to reduce burden and expense. Examples follow, which would be the subject of the meet and confer with Defendants within 30 days of the Consolidated Amended Complaint:

- ***Production of relevant transactional data:*** The production of transactional data is relevant to Plaintiffs' demonstration of antitrust impact across the Class in their Motion For Class Certification, as well as their ability to demonstrate that class-wide damages can be calculated from available data. For this reason, the transactional data must be prioritized.
- ***Prioritized custodian files.*** Prior to class certification, Plaintiffs propose to conduct targeted discovery that requires the parties to share information, whether through truncated written discovery (*e.g.*, organizational charts together with voluntary information) or depositions pursuant to Fed. R. Civ. P. 30(b)(6) that permit Plaintiffs to identify the key custodians by Defendant. Plaintiffs would then identify centrally-

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<sup>9</sup> See also APP 71-73 (*In re Pharm. Indus. Average Wholesale Price Litig.*, MDL No. 1456, No. 01-12257-PBS (D. Mass.) (Case Management Order No. 5 dated October 28, 2002) (ordering defendants to produce: "A copy of the set or sets of documents, if any, previously produced by a defendant to any federal or state executive or legislative agency or entity in connection with any investigation into, in whole or in part, the use of the average wholesale price ("AWP") in the pricing or reimbursement of a drug manufactured by that defendant during the Class Period.")); APP 74-78 (*Government Emps. Hosp. Ass'n et al. v. Serono Labs, Inc.*, No. 05-11935 (D. Mass.) (Order on Plaintiffs' Motion To Enforce Court Order) (ordering defendants to "produce all non-work product, non-privileged documents previously produced to the Government in any federal or state criminal investigation, grand jury investigation, or false claims act investigation concerning the development, manufacture, marketing, pricing, or sale of the drug Serostim.")).



located files and a reasonable set of custodian files to be searched and produced for each Defendant as a first wave, subject to supplementation at an appropriate time.<sup>10</sup>

**c. Protocol for the Production of Electronically-Stored Information**

Because this case focuses on the online travel system, the majority of the documents in this matter will likely be maintained and produced electronically. Plaintiffs thus propose a Protocol for the Production of Electronically-Stored Information (“ESI Protocol”) that requires the native production of documents for several reasons.<sup>11</sup> *See* APP 87-101.

First, a native production ensures that the documents will be produced as they are created in the ordinary course of business, preserving a reviewing party’s ability to search documents that have not been destroyed or degraded. Native productions ensure that metadata productions are complete and searchable, enabling efficient management and review of documents.<sup>12</sup>

A native production is also less burdensome, lowering Plaintiffs’ document review costs and significantly increasing their ability to organize and search for documents. And, native file productions have lower administrative costs as they do not require the same file processing time and vendor costs associated with alternative production formats such as PDF or Tagged Image File Format (“TIFF”).<sup>13</sup> Moreover, if documents are converted from native to other production formats, important information can be lost, such as imbedded mathematical formulae in Excel spreadsheets, tracked changes in Word documents and color in PowerPoint presentations.

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<sup>10</sup> A similar procedure was recently used in *In re Optical Disk Drive Antitrust Litig.*, 3:10-md-2143 (N.D. Cal.). *See, e.g.*, APP 79-86 (Order Regarding Discovery Matters dated December 14, 2012).

<sup>11</sup> Plaintiffs also propose a Preservation Order. APP 136-138. This order is based on the Preservation Order entered in *In Re: Nexium (Esomeprazole) Antitrust Litig.*, MDL No. 2409 (D. Mass.). APP 102-105.

<sup>12</sup> *See, e.g., Osborne v. C.H. Robinson Co.*, 2011 U.S. Dist. LEXIS 123168, at \*19 (N.D. Ill. Oct. 25, 2011) (“PDF and TIFF files have a static format that can be advantageous, but they can also be time consuming to create and lose searchable text and metadata that might enable the parties to more efficiently digest the information.”) (citation omitted).

<sup>13</sup> *See, e.g., Covad Communs. Co. v. Revonet, Inc.*, 254 F.R.D. 147, 150 (D.D.C. 2008) (“I will assume that the e-mails at issue exist in what I have called their native format and can be copied onto a CD with a couple of keystrokes. Obviously, printing them or converting them to TIFF files probably (and ironically) costs more so Revonet is hard pressed to claim that producing them now in their native format is unfairly burdensome.”).

#### **d. Discovery Disputes**

In any case, but particularly one with numerous Plaintiffs and Defendants, discovery can get quickly bogged down in discovery disputes with lengthy briefing. Several MDL courts have thus used procedures to allow discovery disputes to be resolved efficiently. For example, in *In re Bayer Combination Aspirin Sales & Mktg. Practices Litig.*, No. 09-md-2023 (E.D.N.Y.), and *In re Vitamin C Antitrust Litig.*, MDL No. 1738 (E.D.N.Y.), the Honorable Brian Cogan's Individual Practices require the parties to describe their discovery disputes in a single three-page letter, jointly composed. The court then rules on the dispute or orders additional briefing.<sup>14</sup> Similarly, in *In Re: Nexium (Esomeprazole) Antitrust Litig.*, MDL No. 2409 (D. Mass.), the Honorable William G. Young handles discovery disputes like baseball arbitration: each side states their position on a disputed issue in a paragraph or less and the court then chooses the most reasonable position.<sup>15</sup> These types of approaches substantially reduce unnecessary motion practice and allow the Court to more efficiently resolve disputes and control the docket.

#### **C. Proposed Protective Order**

The Original and Consensus Plaintiffs propose a Protective Order modeled from the Stipulated Protective Order of Confidentiality approved by the Honorable Ed Kinkeade in *In re DePuy Orthopaedics Inc. Pinnacle Hip Implant Prods. Liab. Litig.*, No. 3:11-MD-2244-K (N.D. Tex. May 7, 2012). APP 106-118 (Proposed Order), APP 119-135 (Order in *In re DePuy*).

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<sup>14</sup> See Individual Practices Of Judge Brian M. Cogan, § III.A.1, available at <https://www.nyed.uscourts.gov/content/judge-brian-m-cogan> (last accessed February 6, 2013).

<sup>15</sup> See example at APP 105.

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Respectfully Submitted,

By: /s/ Marc R. Stanley

Marc Stanley  
STANLEY IOLA LLP  
3100 Monticello Avenue, Suite 750  
Dallas, TX 75205  
Telephone: (214) 443-4300  
Facsimile: (214) 443-0358  
marcstanley@mac.com

Steve W. Berman  
HAGENS BERMAN SOBOL SHAPIRO LLP  
1918 8th Avenue, Suite 3300  
Seattle, WA 98101  
Telephone: (206) 623-7292  
Facsimile: (206) 623-0594  
steve@hbsslaw.com

Elizabeth A. Fegan  
HAGENS BERMAN SOBOL SHAPIRO LLP  
1144 W. Lake St., Suite 400  
Oak Park, IL 60301  
Telephone: (708) 628-4960  
Facsimile: (708) 628-4950  
beth@hbsslaw.com

Kit A. Pierson  
Meghan M. Boone  
COHEN MILSTEIN SELLERS & TOLL PLLC  
1100 New York Avenue, N.W.  
Suite 500, West Tower  
Washington, DC 20005  
Telephone: (202) 408-4600  
Facsimile: (202) 408-4699  
kpierson@cohenmilstein.com  
mboone@cohemnilstein.com

Eugene A. Spector  
Jeffrey J. Corrigan  
Jay Cohen  
SPECTOR ROSEMAN  
KODROFF & WILLIS, P.C.  
1818 Market Street, Suite 2500  
Philadelphia, PA 19103  
Telephone: (215) 496-0300  
Facsimile: (215) 496-6611  
espector@srkw-law.com

Ruthanne Gordon  
Michael C. Dell'Angelo  
Candice J. Enders  
BERGER & MONTAGUE, P.C.  
1622 Locust Street  
Philadelphia, PA 19103  
Telephone: (215) 875-3000  
Facsimile: (215) 875-4604  
rgordon@bm.net  
mdellangelo@bm.net  
cenders@bm.net

Eric H. Gibbs  
Dylan Hughes  
Scott Grzenczyk  
GIRARD GIBBS LLP  
601 California Street, 14th Floor  
San Francisco, CA 94108  
Telephone: (415) 981-4800  
Facsimile: (415) 981-4846

Joseph W. Cotchett  
Steven N. Williams  
COTCHETT, PITRE & MCCARTHY, LLP  
San Francisco Airport Office Center  
840 Malcolm Road, Suite 200  
Burlingame, CA 94010  
Telephone: (650) 697-6000  
Facsimile: (650) 697-0577

Nancy Kaboolian  
Natalie S. Marcus  
ABBEY SPANIER RODD & ABRAMS, LLP  
212 East 39th Street  
New York, NY 10016  
Telephone: (212) 889-3700  
nkaboolian@eyspanier.com  
nmarcus@abbeyspanier.com

Laurence D. Paskowitz  
THE PASKOWITZ LAW FIRM, P.C.  
208 East 51st Street, Suite 380  
New York, NY 10022  
Telephone: (212) 685-0969  
lpaskowitz@pasklaw.com

Will Riley  
PRICE WAICUKAUSKI & RILEY, LLC  
301 Massachusetts Avenue  
Indianapolis, IN 46204  
Telephone: (317) 633-8787

Daniel J. Mogin  
THE MOGIN LAW FIRM, P.C.  
707 Broadway, Suite 1000  
San Diego, CA 92101  
Telephone: (619) 687-6611  
Facsimile: (619) 687-6610  
dmogin@moginlaw.com

Ronen Sarraf  
Joseph Gentile  
SARRAF GENTILE LLP  
450 Seventh Avenue, Suite 1900  
New York, NY 10123  
Telephone: (212) 868-3610  
Facsimile: (212) 918-7967  
ronen@sarrafgentile.com  
joseph@sarrafgentile.com

Irwin B. Levin  
Richard E. Shevitz  
Scott D. Gilchrist  
COHEN & MALAD, LLP  
One Indiana Square, Suite 1400  
Indianapolis, IN 46204  
Telephone: (317) 636-6481  
Facsimile: (317) 636-2593

Laurence D. King  
Linda M. Fong  
KAPLAN FOX & KILSHEIMER LLP  
350 Sanson Street, Suite 400  
San Francisco, CA 94104  
Telephone: (415) 772-4700  
Facsimile: (415) 772-4707  
lking@kaplanfox.com  
lfong@kaplanfox.com

Justin B. Farar  
KAPLAN FOX & KILSHEIMER LLP  
11111 Santa Monica Blvd, Suite 620  
Los Angeles, CA 90025  
Telephone: (310) 575-8670  
Facsimile: (310) 575-8697  
jfamr@kaplanfox.com

David E. Bower  
FARUQI & FARUQI, LLP  
10866 Wilshire Boulevard, Suite 1470  
Los Angeles, CA 90024  
Telephone: (424) 256-2884  
Facsimile: (424) 256-2885  
dbower@faruqilaw.com

Joseph T. Lukens  
Richard D. Schwartz  
FARUQI & FARUQI, LLP  
101 Greenwood Avenue, Suite 600  
Jenkintown, PA 19046  
Telephone: (215) 577-5770  
Facsimile: (215) 577-5771  
jlukens@faruqilaw.com  
rschwartz@faruqilaw.com

Guido Saveri  
R. Alexander Saveri  
SAVERI & SAVERI, INC.  
706 Sansome Street  
San Francisco, CA 94111  
Telephone: (415) 217-6810  
Facsimile: (415) 217-6813  
guido@saveri.com

Brian J. Barry  
LAW OFFICES OF BRIAN BARRY  
1925 Century Park East, Suite 2100  
Los Angeles, CA 90067  
Telephone: (323) 522-5584  
bribarry1@yahoo.com

Douglas A. Millen  
Donald L. Sawyer  
FREED KANNER LONDON & MULLEN LLC  
2201 Waukegan Road, Suite 130  
Bannockburn, IL 60015  
Telephone: (224) 632-4500  
Facsimile: (224) 632-4521  
doug@fklmlaw.com

Christian M. Sande  
Christian Sande LLC  
310 Clifton Avenue, Suite 300  
Minneapolis, MN 55403  
Telephone: (612) 387-1430  
Facsimile: (612) 677-3078

Joseph R. Saveri  
Lisa Jennifer Leebove  
SAVERI LAW FIRM  
255 California, Suite 450  
San Francisco, CA 94111  
Telephone: (415) 500-6800  
Facsimile: (415) 500-6803  
Email: jsaveri@saverilawfirm.com  
lleebove@saverilawfirm.com

Vincent J. Esades  
Renaë Diane Steiner  
HEINS MILLS & OLSON, P.L.C.  
310 Clifton Avenue  
Minneapolis, MN 55403  
Telephone: (612) 338-4605  
Facsimile: (612) 338-4692  
vesades@heinsmillrsteiner@heinsmills.com

Lee Albert  
Brian Murray  
GLANCY BINKOW & GOLDBERG LLP  
30 Broad Street, Suite 1401  
New York, NY 10004  
Telephone: (212) 382-2221

Brett Cebulash  
Kevin Landau  
TAUS CEBULASH & LANDAU LLP  
80 Maiden Lane, Suite 1204  
New York, NY 10038  
Telephone: (212) 931-0704

John Emerson  
EMERSON POYNTER LLP  
The Museum Building  
500 President Clinton Avenue  
Suite 305  
Little Rock, AR 72201  
Telephone: (501) 907-2555  
Facsimile: (501) 907-2556

Craig C. Corbitt  
Christopher T. Micheletti  
Judith A. Zahid  
Demetrius Xavier Lambrinos  
ZELLE HOFMANN VOELBEL  
& MASON LLP  
44 Montgomery Street Suite 3400  
San Francisco, CA 94104  
Telephone: (415) 693-0700  
Facsimile: (415) 693-0770  
ccorbitt@zelle.com  
cmicheletti@zelle.com  
jzahid@zelle.com  
dlambrinos@zelle.com

Todd A. Seaver  
BERMAN DEVALERIO  
One California Street, Suite 900  
San Francisco, CA 94111  
Telephone: (415) 433-3200  
Facsimile: (415) 433-6382  
tseaver@bermandevalerio.com

Ralph B. Kalfayan  
KRAUSE KALFAYAN BENINK  
& SLAVENS, LLP  
550 W. C Street, Suite 530  
San Diego, CA 92101  
Telephone: (619) 232-0331  
Facsimile: (619) 232-4019  
Ralph@kkbs-law.com

Paul Mark Sandler  
SHAPIRO SHER GUINOT AND SANDLER  
36 S Charles St., Suite 2000  
Baltimore, MD 21201  
Telephone: (410) 385-0202  
Facsimile: (410) 539-7611  
pms@shapirosher.com

Howard Sedran  
LEVIN, FISHBEIN, SEDRAN & BERMAN  
510 Walnut Street, Suite 500  
Philadelphia, PA 19106  
Telephone: (877) 882-1011

Roger Mandel  
LACKEY HERSHMAN LLP  
3102 Oak Lawn Avenue, Suite 777  
Dallas, TX 75219-4241  
Telephone: (214) 560-2201  
Facsimile: (214) 560.2203

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on February 20, 2013 the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing. Parties may access this filing through the Court's system.

/s/ Marc R. Stanley

Marc R. Stanley